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Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996
Fourteenth session
12-16 April 2010

Draft report

Rapporteur: Mr. Andi **Xhoi** (Albania)

I. Introduction

1. The fourteenth session of the Ad Hoc Committee established by the General Assembly in its resolution 51/210 of 17 December 1996 was convened in accordance with paragraph 23 of General Assembly resolution 64/118. The Committee met at Headquarters from 12 to 16 April 2010.

2. In accordance with paragraph 9 of General Assembly resolution 51/210, the Ad Hoc Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency.

3. At its 44th meeting, on 12 April 2010, the Committee, on the basis of previous practice, decided that the members of the Bureau of the Committee at the previous session would continue to serve in their respective capacities. The Bureau was thus constituted as follows:

Chair:

Rohan Perera (Sri Lanka)

Vice-Chairs:

Maria Telalian (Greece)
Ana Cristina Rodriguez-Pineda (Guatemala)
Namira Nabil Negm (Egypt)

Rapporteur:

Andi Xhoi (Albania)

4. Vaclav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Ad Hoc Committee, assisted by George Korontzis as Deputy Secretary. The Codification Division of the Office of Legal Affairs provided the substantive services for the Committee.

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5. At the same meeting, the Ad Hoc Committee adopted the following agenda (A/AC.252/L.19):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Consideration of the questions contained in the mandate of the Ad Hoc Committee as set out in paragraph 22 of General Assembly resolution 64/118 of 16 December 2009.
6. Adoption of the report.

6. The Ad Hoc Committee had before it the report on its thirteenth session.[1] It also had before it the reports on its eleventh session, containing the proposal to facilitate agreement on elements of an overall package, and on the sixth session,[2] containing, inter alia, a discussion paper prepared by the Bureau on the preamble and article 1 of the draft comprehensive convention on international terrorism; informal texts of articles 2 and 2 bis, prepared by the coordinator; the texts of articles 3 to 17 bis and 20 to 27 prepared by the Friends of the Chair; texts relating to article 18, one circulated by the coordinator for discussion and the other proposed by the States members of the Organization of the Islamic Conference; a list of proposals made during the informal consultations on the preamble and article 1 appended to the report of the coordinator on the results of the informal consultations in the Ad Hoc Committee; and two letters of 2005 from the Permanent Representative of Egypt to the United Nations concerning the convening of a high-level special session of the General Assembly on cooperation against terrorism.[3]

II. Proceedings

7. The Ad Hoc Committee held three plenary meetings: the 44th and 45th on 12 April and the 46th on 16 April 2010.

8. At the 44th meeting, the Ad Hoc Committee adopted its work programme and decided to proceed with discussions in informal consultations and informal contacts. At the 44th and 45th meetings, the Committee held a general exchange of views on the draft comprehensive convention and on the question of convening a high-level conference. The informal consultations regarding the draft comprehensive convention on international terrorism were held on 12 and 13 April and informal

[1] A/64/37.

[2] A/62/37 and A/57/37 and Corr.1. See also the reports of the Ad Hoc Committee on its seventh to tenth sessions and on its twelfth session (A/58/37), (A/59/37), (A/60/37), (A/61/37), and (A/63/37). See also the reports of the Working Group established at the fifty-fifth to sixtieth sessions of the General Assembly (A/C.6/55/L.2, A/C.6/56/L.9, A/C.6/57/L.9, A/C.6/58/L.10, A/C.6/59/L.10 and A/C.6/60/L.6). The summaries of the oral reports of the Chairman of the Working Group established at the sixty-first, sixty-second, sixty-third and sixty-fourth sessions are contained in documents A/C.6/61/SR.21, A/C.6/62/SR.16, A/C.6/63/SR.14 and A/C.6/64/SR.14, respectively.

[3] Letters dated 1 and 30 September 2005 from the Permanent Representative of Egypt to the United Nations addressed to the Secretary-General and the Chairman of the Sixth Committee, respectively (A/60/329 and A/C.6/60/2).

contacts were held on 12, 13 and 14 April. An informal summary of those discussions, prepared by the Chair, appears in annex I to the present report. The informal summary is intended for reference purposes only and not as a record of the discussions.

9. On 12 and 16 April, the Coordinator of the draft convention, Maria Telalian (Greece), made statements briefing delegations on the informal contacts held intersessionally on 9 April 2010 and during the current session, respectively. A summary of those reports appears in annex II to the present report, for reference purposes only and not as a record of discussions.

10. The informal consultations concerning the question of convening a high-level conference under the auspices of the United Nations to formulate a joint organized response of the international community to terrorism in all its forms and manifestations were held on 13 April. An informal summary of those discussions, prepared by the Chair, appears in annex I to the present report. The informal summary is intended for reference purposes only and not as a record of the discussions.

11. At the 46th meeting, on 16 April, the Ad Hoc Committee adopted the report on its fourteenth session.

III. Recommendation

[text to be inserted]

Annex I

Informal summary prepared by the Chair on the exchange of views in plenary meeting and on the results of the informal consultations

A. General

1. During the general exchange of views at the 44th and 45th meetings of the Ad Hoc Committee, on 12 April 2010, delegations reaffirmed their strong condemnation of terrorism in all its forms and manifestations, committed by whomsoever, wherever and for whatever purposes. They also emphasized that acts of terrorism could never be justified under any circumstances. The assertion was also made that terrorism should not be associated with any religion, race, culture, ethnic or national group. Initiatives seeking to promote dialogue among civilizations, cultures and religions were thus welcomed. It was noted that acts of terrorism threatened the territorial integrity of States and their stability. Moreover, terrorism was one of the main threats not only to international peace and security, but also to human life and dignity, as well as to the functioning of democratic institutions and that to counter it required a global and coordinated response.

2. Delegations stressed that the fight against terrorism should be conducted in conformity with international law, including the Charter of the United Nations, as well as with the relevant provisions of human rights, refugee and humanitarian law; measures to counter it should also respect the rule of law. It was also pointed out that there should be respect for human rights and fundamental freedoms in the work of Security Council sanctions committees, while echoing the need to streamline listing and de-listing procedures in order to guarantee due process and transparency. Some delegations emphasized that combating terrorism should not be used as a pretext for violating the prohibition of the use or threat of use of force, nor for intervening in the affairs of sovereign States or violating human rights. Moreover, the use of double standards in countering terrorism was cautioned against.

3. Some delegations underlined the importance of distinguishing between acts of terrorism and the legitimate struggle of peoples in the exercise of their right to self-determination. Citing particular examples, which they considered as constituting State terrorism, some delegations viewed it as one of the most horrendous forms of terrorism.

4. Some delegations urged States to fulfil their obligations under international law in combating terrorism and to refrain from supporting terrorist activities, including financing, encouraging and providing training. In particular the necessity to suppress the financing of terrorism was underlined. In this context, the importance of countering drug trafficking, which served as a financial resource for some terrorist groups, was highlighted. A call was also made for the adoption of measures that would prevent the payment of ransoms to terrorist groups or groups associated with them.

5. Delegations underlined the central role of the United Nations as the appropriate framework for the coordination of counter-terrorism efforts, and the crucial role played by it system-wide, including in matters concerning technical assistance. General support was expressed for the United Nations Global Counter-

Terrorism Strategy, noting in particular that States had the primary responsibility for its implementation. Some delegations welcomed the review of the Strategy. It was also pointed out that the Strategy constituted an ongoing effort and a living document, which should be updated and examined regularly, and that balance should be maintained in the implementation of its four pillars. Some delegations also expressed their support for the Counter-Terrorism Implementation Task Force and welcomed its institutionalization.

6. Some delegations reiterated their call for a wider participation of States in the various existing international counter-terrorism instruments. The need for international cooperation, including in extradition and mutual assistance matters, was highlighted. Delegations also gave examples of steps taken at the national, regional and subregional levels to combat international terrorism.

7. Some delegations expressed their support for the proposal of Tunisia to elaborate an international counter-terrorism code of conduct, as well as for the proposal of Saudi Arabia to establish an international centre to combat terrorism, under the auspices of the United Nations. Attention was also drawn to research centres established at the regional level focusing on combating terrorism and the need to have collaborative efforts and assistance.

B. Draft comprehensive convention on international terrorism

8. Comments on the draft comprehensive convention on international terrorism were made during the general exchange of views at the 44th and 45th meetings and the informal consultations held on 12 and 13 April 2010.

9. Delegations reiterated the importance they attached to the early conclusion of the draft convention. In this context, references were made by some delegations to the 2005 World Summit Outcome,[4] which had already called for the adoption of the convention by the General Assembly during its sixtieth session. Thus, States were urged to show flexibility and approach the negotiations in a spirit of compromise in order to conclude work on the draft convention by consensus.

10. Several delegations emphasized that the draft convention would fill gaps and complement the existing sectoral conventions and thus effectively strengthen the legal counter-terrorism framework. Referring to the law-enforcement nature of the draft convention, as well as to the strengthened cooperation provisions, including the aut dedere aut judicare regime thereunder, some delegations indicated that it would serve as a useful tool in the prevention and suppression of international terrorism and provide a practical framework for cooperation and coordination among States.

11. Concerning the outstanding issues surrounding the draft convention, several delegations stressed the need for the convention to include a clear definition of terrorism. It was reiterated that it should distinguish between acts of terrorism and the legitimate struggle of peoples in the exercise of their right to self-determination under foreign occupation and colonial or alien domination. Some delegations suggested that the draft convention should include the notion of State terrorism, including acts committed by Governments against innocent civilians, while also

[4] Resolution 60/1.

reiterating the relevance of previous proposals (see A/60/37, annex III). Moreover, the view was expressed, subject to progress on draft article 18, that the definition contained in draft article 2 of the draft convention might need to be reconsidered in order to further emphasize the above concerns. It was also pointed out that the draft convention should cover activities undertaken by the armed forces of a State that were not covered by international humanitarian law. It was further suggested that the draft convention should address the root causes of terrorism.

12. While expressing a willingness to continue considering the 2007 elements of an overall package made by the Coordinator relating to draft article 18, some delegations reiterated their preference for the proposal circulated in 2002 by the Organization of the Islamic Conference, which they considered better addressed their concerns. Some other delegations expressed a preference for the proposal circulated in 2002 by the former Coordinator. These delegations nevertheless reiterated their willingness to seriously consider the 2007 elements of a package. They took note of the fact that there was a certain momentum for a decisive step forward and expressed support for an approach that did not seek to modify or create new obligations under international humanitarian law and that ensured respect for those rules.

13. According to another view, progress on the draft convention was predicated on two principles, namely that the draft convention excluded from its scope the activities of military forces of a State, which were already covered by other regimes, and that it included activities undertaken by national liberation movements. It was recalled that previously concluded counter-terrorism instruments, and in particular the International Convention for the Suppression of Terrorist Bombings, had been adopted based on such premises. The concern was expressed that the 2007 elements of the package could introduce ambiguities with regard to the scope of application of the draft convention that did not exist in the 2002 Coordinator's text or in similar provisions in the sectoral conventions. To move forward, it was necessary to agree that the 2007 elements of a package did not attempt to modify these principles. As a response to these concerns, it was suggested that an accompanying resolution could provide an understanding with regard to the interpretation of the scope of application of the draft convention.

14. Several delegations reiterated their support for the 2007 elements of a package by the Coordinator and considered that it constituted a legally sound basis for compromise. In their view, the 2007 elements of a package fully addressed the concerns raised by delegations during the negotiations, it respected the integrity of international humanitarian law and other international legal regimes, without granting anyone impunity. It was observed that the activities of a member or of a group of the military forces could fall under the draft convention if these activities were unlawful. In this regard, it was pointed out that it was necessary to consider draft article 2 and draft article 18 together to properly appreciate the inclusionary and exclusionary elements. It was also pointed out that the "without prejudice" clauses contained in paragraphs 1 and 5 of draft article 18 effectively left the right to self-determination under international law intact. It would not be possible to go any further without affecting existing legal principles. Recalling that the draft convention was a law-enforcement instrument based on an aut dedere aut judicare regime, the view was also expressed that the notion of State terrorism must be avoided. While several delegations expressed their willingness to consider the 2007 elements of a package as a basis for negotiations, it was also emphasized that they

needed to be considered as a package and that delegations should not be able to pick and choose among the suggested elements. Some delegations also stressed that work should focus on draft article 18 relating to the scope of application of the draft convention. It was pointed out that it would be unwise to reopen texts elsewhere in the draft convention that had, in principle, already been agreed upon.

15. Referring to the suggestions made by the Coordinator at the 2009 working group of the Sixth Committee, some delegations expressed support for the proposal to place draft article 18 closer to draft article 2, as well as to address certain outstanding issues in an accompanying resolution. It was also pointed out that the title of the draft convention could be decided upon at the end of the negotiating process.

16. In response to the positions and concerns expressed during the general debate and the informal consultations on 12 and 13 April 2010, the Coordinator suggested that draft paragraph 5 of the 2007 elements of a package could be moved up to become paragraph 2 if it helped to better locate the relationship with the principles referred to in paragraph 1, including the right to self-determination.

17. Furthermore, in response to a request for clarification with regard to her statement of 12 April (see annex II, sect. A below), the Coordinator emphasized that her explanations of the aim of the elements of a package had been consistent throughout the deliberations. She reiterated that the 2007 elements of a package built on existing language and that the additional elements were presented to bridge the divergent views among delegations, which were best reflected in the two proposals circulated in 2002. The new paragraph 5 of draft article 18 was meant to clarify and provide further guidance to these two proposals. She had used the word "proposals" in plural to make it perfectly clear — and this was the essence of her 12 April statement — that legally the 2002 proposals were not fundamentally different. Both proposals contained statements of principles with regard to the delineation between the draft convention and international humanitarian law. The main purpose of the additional elements of the 2007 elements of a package was to further clarify this delineation and ensure that the integrity of international humanitarian law was respected. The Coordinator also reiterated that the 2007 elements should be understood as a package.

C. Question of convening a high-level conference

18. During the 44th meeting on 12 April 2010 and the informal consultations on 13 April, the sponsor delegation of Egypt underscored the importance of holding a high-level conference under the auspices of the United Nations to formulate a joint organized response of the international community to terrorism in all its forms and manifestations, as soon as possible. The Conference could consider the question of terrorism in all its aspects, including to reach a specific definition of terrorism that differentiated between legal rules to combat terrorism and international humanitarian law, as well as address the root causes of terrorism. It could also focus on the importance of education, communication, human rights and the rule of law in countering terrorism. The delegation of Egypt pointed out that its proposal had the support of the Movement of the Non-Aligned Countries, the Organization of the Islamic Conference, the African Union and the League of Arab States. It was further stressed that terrorism should not be linked to any religion and that dialogue should

be supported in this respect. The delegation of Egypt re-emphasized the importance of not linking the issue of an international conference with the completion of the convention.

19. During the 44th and 45th meetings, on 12 April, as well as during the informal consultations on 13 April, several delegations reiterated their support for the holding of a high-level conference. Some delegations highlighted that such a conference would provide the opportunity to agree on a definition of terrorism and identify the root causes, and would serve as a platform to resolve other outstanding issues and reconcile positions among delegations. While some delegations underlined that the convening of a high-level conference should not be linked to the conclusion of the negotiations on the draft comprehensive convention, some other delegations mentioned that the conference should only be convened or the question of its convening considered following an agreement on the comprehensive convention. It was mentioned that such a conference would present an excellent opportunity to promote participation in the convention, to discuss the needs of technical assistance and to coordinate among State parties.

Annex II

Reports on the informal contacts on the draft comprehensive convention on international terrorism

A. Summary of the briefing on the results of intersessional informal contacts

1. In her statement on the intersessional informal contacts on the outstanding issues on the draft comprehensive convention on international terrorism, the Coordinator of the draft convention, Ms. Telalian (Greece), reported that she was encouraged by an increase in the number of delegations who had sought to touch base with her intersessionally in comparison to previous years. One round of formal bilateral contacts with interested delegations was also organized on 9 April. The aim of such contacts, announced in the Journal of the United Nations, was to obtain a clearer picture on positions of delegations on the outstanding issues, and on the negotiation process as a whole.

2. Referring to the elements of a possible package that were presented in 2007, the Coordinator recalled that in the past, beginning in 2007, she had offered the background and rationale for those elements, as well as provided additional clarifications. She stressed that those observations remained valid.

3. The Coordinator further recalled that during the 2009 working group of the Sixth Committee, she had put forward some suggestions for consideration with the purpose of advancing the work to conclude the draft convention. First, it had been suggested to place article 18 closer to article 2. This was intended to faithfully reflect the link between the inclusionary elements in article 2 and the exclusionary elements, by way of applicable law and "without prejudice" clauses, as was currently reflected in draft article 18. Second, as a way of managing expectations, it had been suggested that the title of the draft convention be changed, including the suggestion that the title be "United Nations Convention for the Prevention and Suppression of International Terrorism". Third, it had been suggested that some of the concerns that had been raised during the negotiations be captured in an accompanying resolution. She considered it premature for now to deal with the exact content of such a resolution, which would be negotiated depending on the final outcome on the outstanding issues. She nevertheless reminded delegations that there were precedents where an accompanying resolution had incorporated understandings aimed at clarifying some unresolved issues.

4. The Coordinator further reported that in her contacts with delegations, they had all affirmed the importance that they attached to the conclusion of the draft convention. It was recalled that, since 2007, in the course of the negotiations, things had moved forward in the sense that there was a text on which views of delegations had been sought. Listening to delegations reiterating their concerns and positions with regard to draft article 18, the Coordinator reported that she had become convinced that the positions, from a legal perspective, were not that far apart as might appear. Referring back to where things stood in 2002, she observed that there seemed to be two key differences and that those differences were best reflected in the text of draft article 18 proposed by the former Coordinator and the text by the Organization of the Islamic Conference, found in the 2002 report of the Ad Hoc Committee. Those differences related to the terms used in paragraphs 2 and 3.

The first related to the use of the terms, in one case, "the activities of armed forces during an armed conflict" and, in another case, the terms "the activities of the parties during an armed conflict, including in situations of foreign occupation".

The second related to the terms found in paragraph 3, "inasmuch as they are governed by other rules of international law" in one instance and "inasmuch as they are in conformity with international law" in another.

5. Addressing the first point of difference, the Coordinator emphasized that it had always been understood that the draft convention would co-exist, in particular, with three already established international legal regimes, namely, the law of the Charter of the United Nations, international humanitarian law and the law relating to national and international security. The challenge for the negotiators had always been to elaborate a legal framework for combating international terrorism in a way that would not adversely affect the already existing regimes. If there was any agreement at all on the approach it was in the fact that it was essential not to encroach upon any of those regimes. It was recalled that the necessity to preserve the integrity of international humanitarian law had been reiterated throughout the discussions by many delegations. Any attempt to rectify what some might consider gaps or deficiencies in that regime should be avoided.

6. The Coordinator added that the language of the exclusionary clauses of present draft article 18 had been carefully negotiated over a period of time, starting with the International Convention for the Suppression of Terrorist Bombing. The key terms "armed forces" and "armed conflict", as recalled in paragraph 2 above, were terms that are governed by international humanitarian law and had, in that context, taken on very specific meanings. The discussions on the outstanding issues thus far, to some extent, mirrored the debates that occurred when those terms were negotiated in the context, in particular, of the 1949 Geneva Conventions and the 1977 Additional Protocols. Both the term "armed forces" and the term "armed conflict" had been thoroughly discussed during the various conferences. Attention was drawn to the commentaries to the 1949 Geneva Conventions, and in particular with regard to common articles 2 and 3, as well as the commentaries to the 1977 Additional Protocols, especially article 1, paragraph 4, and article 43 of Protocol I, which revealed the extent to which those terms had developed and progressed in the context of international humanitarian law. The usage of the phrase "armed forces of a Party to a conflict" in Protocol I exemplified a transition from a purely statist construction. Accordingly, when the terms "the activities of armed forces during an armed conflict" or "the activities of the parties during an armed conflict" were used, the rich history in international humanitarian law had to be borne in mind.

7. While differences regarding the interpretation of those terms and their scope might exist, those differences, if at all, could and should not be resolved in the context of the current negotiations. If an attempt was made to give a new meaning to them, injustice would be done to those involved in the negotiations and to the integrity of international humanitarian law.

8. The Coordinator considered that with the application of a good faith understanding of the development of those terms, as could be seen from the commentaries, the direction to which the negotiators had intended to point ought to be understood. She stressed that such an understanding ought to assist delegations to avoid tilting the balance for or against past views, or to reinterpret the scope and

meaning of those terms. That was why the negotiators had elected to use a convoluted but nevertheless important phrase "as those terms are understood under international humanitarian law, which are governed by that law" to qualify the activities of armed forces during an armed conflict. To the extent that the principle that international humanitarian law would govern had been agreed upon, going any further in the draft convention would have an effect on that very principle: the "New York law" would be amending the "Geneva law".

9. Concerning the second point of difference, the Coordinator observed that the contours of national and international security law were broad. There were certain areas where the position was clear: such was the case where, under military law, jurisdiction follows the soldier, practically the case in all States. It was no secret that a vast majority of States would object to the idea of placing members of their military forces under the jurisdiction of another State. During the recent discussions on criminal accountability of United Nations officials and experts on mission, such a position was being reiterated in different ways. Another clear situation was where immunity *ratione personae* or immunity *ratione materiae* would be implicated.

10. It was further noted that in some other cases, the scope of national and international security law might be obscure. This was not because impunity was considered desirable. On the contrary, it was recalled that paragraph 4 of draft article 18 pointed to the opposite conclusion. Rather, it was because the law might still be developing. The phrase "inasmuch as they are governed by other rules of international law" was carefully chosen by the negotiators to capture such considerations.

11. The Coordinator recalled that it was against the above background that the 2007 add-ons had to be appreciated. The 2007 elements of an overall package had been developed following extensive consultations among delegations to clarify further the general approach of the principles on which negotiations had proceeded. They were not intended to provide any additional obligations to the 2002 proposals, nor did they seek to modify obligations of States that they already had under international humanitarian law.

12. In concluding, the Coordinator stated that during the past year, several delegations had increasingly emphasized the necessity to take decisive steps forward on the draft convention and bring the long-standing negotiation process to a closure. She was of the view that, with the elements of a compromise package and the suggestions that had been put forward during the 2009 working group of the Sixth Committee, the necessary tools existed to fulfil the Committee's mandate.

B. Summary of the briefing on the results of informal contacts during the current session

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